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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MINNESOTA,
Petitioner,

v.

WAYNE THOMAS CARTER AND MELVIN JOHNS,

Respondents.

On Writ of Certiorari
To The Supreme Court of Minnesota

BRIEF OF 26 STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does a visitor to an apartment have an expectation of privacy which society is prepared to recognize as reasonable based exclusively upon his act of engaging in a common task with the leaseholder of the apartment?

2. Is a police officer's non-enhanced use of his natural senses from a public area in order to investigate a report of criminal activity not a search under the Fourth Amendment to the United States Constitution?

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BRIEF OF 26 STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37, the signatory States respectfully submit this brief as amici curiae in support of Petitioner.

INTEREST OF THE AMICI CURIAE

At stake in this case is the ability of law enforcement officers to investigate, arrest, and successfully prosecute those involved in the occupation of illicitly distributing controlled substances. That ability has been severely hampered in the State of Minnesota by the holding in the instant case, and it would not bode well if accepted by other courts.

There is no need to spell out the tragedies and atrocities which have resulted and continue to result nearly unabated as a consequence of the illegal drug trade. It is a well-recognized issue of national concern. Permitting the Respondents, on the basis of little more than presence in an apartment in order to package drugs, to successfully claim a reasonable expectation of privacy in that apartment, categorizing the unaided observations by a police officer from a public area as a search, and finding the officer's actions unreasonable fly in the face of society's expectations. If accepted as a correct reading of Fourth Amendment law, the holding of the Minnesota Supreme Court provides unwarranted sanctuary to a criminal element and places irrational limits on what a police officer may do in responding to a report of criminal activity.

The interests of the amici States accord with those of the Petitioner, the State of Minnesota, in seeking to overturn the reversal of the Respondents' convictions. The decision of the Minnesota Supreme Court conflicts with relevant decisions of both the United States Supreme Court and other state and federal courts regarding the issue of legitimate privacy expectations of an invitee and the definition of a search under the Fourth Amendment to the

United States Constitution.

SUMMARY OF ARGUMENT

The Fourth Amendment protects the right to be free from unreasonable searches and seizures by government agents. However, that right turns, not entirely or exclusively on the right to privacy, but on a reasonable expectation of privacy in a given activity.

The Fourth Amendment is not place-specific, but people-specific. Nonetheless, notions of property interests remain viable considerations. The home, be it a single-family, detached dwelling, an apartment or condominium, or a temporary hotel or motel room, always merits special protections from unwarranted intrusions to the extent those areas are co-extensive with intimate and private activities. Beyond those areas, and to anything one knowingly exposes to the public, a different standard applies.

As an initial matter, one claiming violation of a Fourth Amendment right while in the dwelling place of another must establish a legitimate expectation of privacy in that place. While this Court has recognized that an overnight guest may rely on the protections of the Fourth Amendment, it has not fully defined what constitutional protections are available to an individual who is legitimately in a dwelling place for a purpose other than an overnight stay. Mere legitimate presence on premises is not enough. And therein lies one of the errors in the holding of the Minnesota Supreme Court.

The Respondents were in the apartment at the invitation of the leaseholder to cut and package cocaine. There was no evidence that the Respondents stayed overnight, had a

key to the apartment and freely came and went, kept personal belongings there, or exerted any control over ingress and egress. The exclusive basis for finding a legitimate expectation of privacy in this case was the sharing of a common task with the leaseholder.

The focus of the Minnesota Supreme Court was misplaced. That focus should have been directed at the relationship of the Respondents to the place in question, not their relationship to the leaseholder. In this case, there was a totally insufficient nexus between the Respondents and the apartment. The Respondents, therefore, had no right to claim violation of any Fourth Amendment privacy interest.

Even assuming for the sake of argument that the protections of the Fourth Amendment were available to Respondents in the apartment, there was nothing in the actions of the police officer to implicate the Fourth Amendment. In considering whether a particular law enforcement activity implicates constitutional protections, one looks at the nature of the space targeted, the location of the government agent, and whether the subject of the activity has exhibited a subjective expectation of privacy that society is prepared to recognize as reasonable. If the targeted space is a public or common area, the government agent is in a place commonly traveled, and the subject has either demonstrated no expectation of privacy, or society is not prepared to accept that expectation as reasonable, there has been no search. Therefore, the subject cannot seek solace in the protections of the Fourth Amendment, as Respondents successfully did in this case.

The common area of a multi-unit apartment complex is not curtilage and is sufficiently utilized by others that the police officer here was in a place he had a right to be. A

noticeable gap in the window blinds demonstrated that the occupants of the apartment did not demonstrate an expectation of privacy from view by those passing through the adjacent common area. Even if the occupants hoped for some level of privacy, under the facts of this case, society is not prepared to accept that hope as a legitimate and reasonable expectation. The officer's brief observations of illicit drug packaging through the gap in the window blinds was not a search.

For all of these reasons, the Minnesota Supreme Court erred in finding that the Respondents had a legitimate expectation of privacy in the apartment and that the actions of the police officer constituted an unreasonable Fourth Amendment search.

ARGUMENT

I.

A VISITOR TO AN APARTMENT, SIMPLY BY VIRTUE OF ENGAGING IN A COMMON TASK WITH THE LEASEHOLDER OF THE APARTMENT, DOES NOT HAVE A FOURTH AMENDMENT EXPECTATION OF PRIVACY WHICH SOCIETY IS PREPARED TO RECOGNIZE AS REASONABLE.

A. Fourth Amendment rights are personal to the individual claiming an infringement of those rights.

No greater right to privacy exists than the right of privacy an individual enjoys in his or her own home. This

right is based upon the Fourth Amendment to the United States Constitution, which provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . " U.S. Const. Amdt. 4. But the "rights assured by the Fourth Amendment are personal rights, [which] . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." *Rakas v. Illinois*, 439 U.S. 128, 138 (1978) (quoting *Simmons v. United States*, 390 U.S. 377, 389 (1968)). In determining whether the exclusionary rule is applicable, a court is to focus "on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." *Rakas v. Illinois*, 439 U.S. at 139. As the Court explained:

> Analyzed in these terms, the question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect.

Id. at 140.

When an individual is in the dwelling place of another, the appropriate inquiry in determining whether the individual claiming the right is entitled to the protection of the Fourth Amendment is whether the individual has exhibited a subjective expectation of privacy and whether that expectation of privacy is one that society is prepared to recognize as reasonable. *Minnesota v. Olson*, 495 U.S. 91, 95-96 (1990) (citing *United States v. Katz*, 389 U.S.

347, 361 (1967) (Harlan, J., concurring)). As explained by the Court in *Vernonia School District 473 v. Acton*, 515 U.S. 646 (1995), the expectations of privacy that society is willing to accept as legitimate vary "depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park." *Id.* at 654.

In *Oliver v. United States*, 466 U.S. 170 (1984), the Court recognized that "[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Id.* at 182-83 (footnote omitted). In determining what privacy expectations society is prepared to recognize as reasonable, "the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment . . . the uses to which the individual has put a location . . . and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." *Id.* at 178. Justice Powell, in his concurring opinion in *Rakas*, offered that consideration should be given to whether the individual invoking the protection of the Fourth Amendment took normal precautions to maintain his privacy; how he used the location; and whether certain types of government intrusion were perceived historically to be objectionable. 439 U.S. at 152-53.

What expectation of privacy society is willing to recognize as reasonable has been decided on a case-by-case basis. In *Katz*, by entering a telephone booth and closing the door, Katz closed out the world from his conversation. Dr. Ortega, in *O'Connor v. Ortega*, 480

U.S. 709 (1987), had a privacy interest in his desk and filing cabinets in his hospital office because his desk and his filing cabinets were under his control. By comparison, in *Rawlings v. Kentucky*, 448 U.S. 98 (1980), because Rawlings had no control over his companion's purse, he had no privacy interest that society was willing to recognize as reasonable. Recognition of any privacy interest as valid turns upon the controls the individual claiming the right exerts and the uses to which he puts the area. Stated otherwise, it is the relationship of the individual who asserted the privacy right to the place in question.

In *Olson*, the Court established that society is willing to recognize as reasonable the right of an overnight guest to be free from a warrantless entry of law enforcement officers to effect his arrest, finding that it was "merely recogniz[ing] the everyday expectations that we all share." 495 U.S. at 98. *Olson*, however, did not reach the question raised herein of what expectation of privacy society is willing to recognize in an individual who is legitimately in a dwelling place for a purpose other than an overnight stay.

B. The Respondents had no legitimate privacy interest in the leaseholder's apartment based only on the sharing of a common task.

In the instant case, the Minnesota Supreme Court found as controlling "the nature of the relationship between the property possessor and the person alleging the privacy interest in the property." *State v. Carter*, 569 N.W.2d 169, 176 (Minn. 1997). Thus the court concluded that "society does recognize as valuable the right of property owners or

leaseholders to invite persons into the privacy of their homes to conduct a common task, be it legal or illegal activity. We, therefore, hold that Carter had standing. . . ." *Id.*

The error committed by the Minnesota court was its focus on the property owner's or leaseholder's right to engage in activities and thereby "bestow" to others an expectation of privacy. The proper focus must be on the relationship the individual claiming the right has with the property itself, not on any right of the property owner or leaseholder.

The reasoning of the Minnesota court echoes the "legitimately on premises" standard of *Jones v. United States*, 362 U.S. 257 (1960). The Court in *Jones* held "that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." *Id.* at 267. Eighteen years later in *Rakas*, the Court rejected this standard, limiting its application to the specific facts in *Jones*. 439 U.S. at 143. According to the Court, the *Katz* legitimate expectation of privacy in the invaded place standard was the appropriate analysis in considering a Fourth Amendment claim. *Id.* The Court found that the phrase, "legitimately on premises" coined in *Jones* "creates too broad a gauge for measurement of Fourth Amendment rights." *Id.* at 141-42.

The record in this case reflects only that Carter, Johns, and Thompson were present in Thompson's apartment for two and one-half hours, during which time their only known activity was cutting and packaging cocaine. The record is devoid of any evidence that either Carter or Johns had any authority to establish their own personal privacy--to control whose eyes or ears detected their

activities in the apartment. Everything Carter and Johns did was observable to anyone who entered Thompson's apartment. While they may have trusted that Thompson would not allow their activities in the apartment to be observed or detected by others, such trust was merely a hope, not an expectation that society recognizes as reasonable. Unlike the expectation of privacy which an overnight guest justifiably holds by virtue of his host's home becoming his temporary dwelling place, society is not willing to recognize that a leaseholder can confer an expectation of privacy simply by virtue of inviting an individual to partake in a "common task" in her domicile.

Since *Olson*, lower courts have addressed the issue of what expectation of privacy society is willing to recognize as reasonable for an individual who is present in the dwelling place of another, with the line drawn somewhere between "legitimately on premises" at one end of the spectrum and "overnight guest" at the other. *See, e.g., United States v. Dickson*, 64 F.3d 409, 410 (8th Cir. 1995) (legitimate overnight guest has reasonable expectation of privacy recognized by Fourth Amendment); *Heard v. State*, 876 S.W. 2d 231, 233 (Ark. 1994) (same); *Hanna v. State*, 591 A.2d 158, 163-64 (Del. 1991) (same); *Brown v. State*, 691 N.E.2d 438, 443 (Ind. 1998) (same). But mere presence in the early morning hours does not establish that one is an overnight guest. *Hill v. United States*, 664 A.2d 347, 352-53 (D.C. 1995) (arrival at apartment at 3:00 a.m. a few minutes before police arrive and feigning sleep while fully dressed and wearing shoes neither established status as overnight guest nor a legitimate expectation of privacy). One who has previously been an overnight guest has no expectation of privacy. *Davasher v. State*, 823 S.W. 2d 863, 868 (Ark. 1992) ("the mere fact that

Davasher frequently stayed at his mother's home does not give him a reasonable expectation of privacy in the premises").

Courts faced with the question of what expectation of privacy society is willing to recognize as reasonable for an individual who is in a dwelling place for purposes of other than being an overnight guest have found no such expectation. *See, e.g., United States v. Hicks*, 978 F.2d 722, 723-24 (D.C. Cir. 1993) (guest using apartment as base for business operations of illegal drug transactions, although legitimately on the premises, did not have a legitimate expectation of privacy); *United States v. Maddox*, 944 F.2d 1223, 1234 (6th Cir. 1991) (party guest has no reasonable expectation of privacy in items found in home); *Fisher v. State*, 665 So.2d 1014 (Ala. Cr. App. 1995) (a party guest who did not establish that he was an overnight guest had no standing to challenge warrantless search of apartment in which he was arrested); *People v. Cowan*, 37 Cal. Rptr. 2d 469, 471 (Cal. App. 1994) (one "who has visited in the past and who was allowed to use the apartment when he visited" does not have a legitimate expectation of privacy); *Lewis v. United States*, 594 A.2d 542, 545-46 (D.C. 1991) (a "mere guest" at a party has no reasonable expectation of privacy in the host's home); *People v. Bass*, 580 N.E.2d 1274, 1283 (Ill. App. 1991) ("mere presence in the home of a friend at the time . . . is insufficient to confer standing"); *State v. Vasquez*, 922 P.2d 426, 428 (Idaho App. 1996) (same); *Owens v. State*, 589 A.2d 59, 63-64 (Md. 1991) (no expectation of privacy where defendant had not spent the night, did not have a key, could only enter with tenant's permission, and had no control over who entered the apartment); *People v. Ortiz*, 593 N.Y.S. 2d 806, 807 (1993) (defendant had no standing

to challenge search of girlfriend's apartment where he was not overnight guest, had not been in apartment for some time, kept no possessions there, had no key, and did not contribute to rent); *People v. Melendez*, 553 N.Y.S. 2d 808, 809 (1990) (defendant's presence in apartment in order to operate drug "factory", without more, insufficient to establish standing). *But see State v. Ackerman*, 499 N.W.2d 882, 884-85 (N.D. 1993) (party guest had standing to contest the legality of police entry at approximately midnight); *United States v. Fields*, 113 F.3d 313, 320-21 (2d Cir. 1997) (individual who paid for use of apartment to cook crack cocaine and had a key so that he could come and go as he pleased had a reasonable expectation of privacy).

Contrary to a majority of other courts, the Minnesota Supreme Court determined that the possessor of property may confer the protections of the Fourth Amendment upon a guest merely by engaging in a "common task." This determination is inconsistent with the standard applied by this Court, which, rather than looking at the interaction of the property possessor and his guest, looks at the relationship of the defendant to the place searched. The Minnesota court's change in focus represents a significant departure from the Court's precedent and should be rejected.

II.

A POLICE OFFICER'S NON-ENHANCED USE OF HIS NATURAL SENSES FROM A PUBLIC AREA IN ORDER TO INVESTIGATE A REPORT OF CRIMINAL ACTIVITY IS NOT A SEARCH UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Non-enhanced observations by police officers while lawfully situated are not searches.

The appropriate inquiry in determining what constitutes a search, and is, thereby, deserving of Fourth Amendment protection is, again, whether an individual has exhibited a subjective expectation of privacy in a given activity and whether that expectation is one that society is prepared to recognize as reasonable. *United States v. Katz*, 389 U.S. at 361. The Court has applied the *Katz* standard to a wide variety of law enforcement activities and techniques. In considering whether government conduct, be it visual, technical, or electronic surveillance, constitutes a search implicating the Fourth Amendment, the Court's attention has been directed to a number of factors, including, but not limited to, the space observed, the place from which a given activity was observed, and the manner of observation. *See, e.g., Smith v. Maryland*, 442 U.S. 735 (1979) (pen register on home telephone); *United States v. Knotts*, 460 U.S. 276 (1983) (beeper transported in automobile); *United States v. Karo*, 468 U.S. 705 (1984) (beeper carried into home); *United States v. Place*, 462

U.S. 696 (1983) (dog sniff of luggage at airport); *California v. Ciraolo*, 476 U.S. 207 (1986) (helicopter overflight of backyard); *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986) (helicopter overflight of commercial activity with aerial mapping camera); *United States v. Dunn*, 480 U.S. 294 (1987) (ground level observation into barn); *Florida v. Riley*, 488 U.S. 445 (1989) (helicopter overflight of greenhouse on private property).

In considering whether there was a search in the case now before the Court, two factors dictate whether Respondents can legitimately claim, for constitutional purposes, an expectation of privacy in their drug packaging activities. The first is whether Officer Thielen was in a place he was allowed to be when he made his observations, and the second focuses on the means he employed in observing the activities of the Respondents. As will be seen, application of the principles espoused by the Court demonstrates that the actions of Officer Thielen did not offend any reasonable expectation of privacy and, therefore, did not constitute a search calling into play the Fourth Amendment rubric.

In both *Ciraolo* and *Dow Chemical*, the Court held that neither the warrantless aerial observation of a defendant's backyard nor aerial observation and photography of a defendant's manufacturing complex implicated the Fourth Amendment. In the former, the police, based on an anonymous tip, flew a helicopter over Ciraolo's backyard, which was shielded from street-level observation by two fences, and observed marijuana plants growing in his yard. 476 U.S. at 209. A lower California court, in reversing Ciraolo's conviction, found that the height and existence of two fences indicated a reasonable expectation of

privacy, and the fact that the overflight was "focused observation" made it a search. *Id.* at 210. On the other hand, the State "analogize[d] its mode of observation to a knothole or opening in a fence: if there is an opening, the police may look." *Id.*

Granting that the fence indicated at least a subjective expectation of privacy on Ciraolo's part, the Court determined that society was not prepared to accept this expectation as reasonable based on the fact that the observations took place in public airspace in a nonintrusive manner. *Id.* at 211-14. According to the Court, "[t]he Fourth Amendment simply does not require the police traveling in public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye." *Id.* at 215. While Ciraolo may have "manifested merely a hope that no one would observe his unlawful gardening pursuits," such hopes do not equate to reasonable expectations of privacy. *Id.* at 212.

Likewise, in *Dow Chemical*, the aerial photography of a 2,000 acre industrial complex was not a search. The Court concluded that the aerial mapping camera used by the Environmental Protection Agency (EPA) may have been more precise than conventional cameras, but it was not "some unique sensory device that, for example, could penetrate the walls of buildings . . . ." 476 U.S. at 238. Accordingly, the taking of photographs by the EPA did not constitute a search warranting Fourth Amendment protection. *Id.* at 239. In so holding, the Court observed:

> It may well be . . . that surveillance of private property by using highly sophisticated equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed without a warrant. But the photographs here are not

> so revealing of intimate details as to raise constitutional concerns. Although they undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems. An electronic device to penetrate walls or windows so as to hear and record confidential discussions . . . would raise very different and far more serious questions[.]

Id. at 238-39.

In *Dunn*, federal agents investigated the possibility that Dunn was operating a phenyl acetone laboratory on his ranch. 480 U.S. at 297. After utilizing beepers to track deliveries to the ranch and taking aerial photographs of the property, agents made a warrantless entry onto the property. *Id.* The agents crossed one perimeter fence, another interior fence, two barbed wire fences, and a wooden fence, walked under an overhang of a barn, and shone a flashlight through netting in order to peer into the barn. *Id.* at 297-98. The officers did not enter the barn on that occasion, or two subsequent visits, and later obtained a search warrant. *Id.* at 298.

The Court applied the analysis in *Ciraolo* in concluding that the barn was not part of the curtilage and that there was no search. *Id.* at 301-03. Alternatively, the Court found that, even if one accepted for argument's sake that the barn was deserving of some Fourth Amendment protection, the agents did nothing more than look into the barn. *Id.* at 303. Although the agents crossed over a number of fences in order to get close to the barn, the fact that they did not enter the premises, but merely stood

outside and peered in, negated any Fourth Amendment violation. *Id.* at 304-05. Thus the Court found nothing constitutionally offensive in the measures taken by the agents to secure the best view of the interior of the barn. Repeating that "the Fourth Amendment 'has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares,'" the Court found it "irrelevant that the police observation at issue was directed specifically at the identification of marijuana plants growing on an area protected by the Fourth Amendment." *Id.* at 304-05 (quoting *California v. Ciraolo*, 476 U.S. at 213).

The Court next applied the principles set forth in *Ciraolo* to the circumstances presented in *Riley*. Riley maintained a greenhouse near his mobile home. 488 U.S. at 448.

> Two sides of the greenhouse were enclosed. The other two sides were not enclosed but the contents of the greenhouse were obscured from view from surrounding property by trees, shrubs, and the mobile home. The greenhouse was covered by corrugated roofing panels, some translucent and some opaque. At the time relevant to this case, two of the panels, amounting to approximately 10% of the roof area, were missing.

Id. A plurality of the Court concluded that, while the property surveilled was within the curtilage and Riley may have intended his greenhouse to be private, as demonstrated by precautions against ground-level observations, he could not reasonably have expected the greenhouse to be obscured from aircraft overhead. *Id.* at 448-50. Further, "[b]ecause the sides and roof of his greenhouse were left partially open, . . . what was growing

in the greenhouse was subject to viewing from the air." *Id.* at 450. Thus, the Fourth Amendment was not implicated when law enforcement officers flew at an altitude of 400 feet over the greenhouse in a helicopter. *Id.* at 451. In so holding, the Court observed that there was no indication "that the helicopter interfered with respondent's normal use of the greenhouse or of other parts of the curtilage. As far as this record reveals, no intimate details connected with the use of the home or curtilage were observed." *Id.* at 452.[1]

B. Officer Thielen was in a place he was allowed to be when he made his observations.

Based on the principles explicated above, Officer Thielen was, for Fourth Amendment purposes, in a place he was permitted to be when he made his observations. While on routine patrol duty, he was approached by an individual who informed him that he or she had just walked by a nearby apartment window and observed people sitting around a table packaging what appeared to be a controlled substance. Officer Thielen investigated the report by going to the apartment complex, walking on the common area up to a window of the ground-level

[1] Justice Brennan, joined by Justice Marshall and Justice Stevens, filed a strong dissent, finding the plurality's basis for its holding to be an unjustified broadening of the *Katz* analysis. 488 U.S. at 456. However, Justice Brennan noted that, where a police officer stands on a public road and views evidence of a crime through an open window or a gap in the fence, "the occupant of the home may be said to lack any reasonable expectation of privacy." *Id.* at 459-60.

apartment, and, from a distance of 12 to 18 inches, looking through a gap in the window blinds. Officer Thielen watched for approximately 10 to 15 minutes as three individuals packaged a white powdery substance. Officer Thielen left the complex and reported what he had learned and seen to a member of the local drug task force, who began the process of securing a warrant and advised Officer Thielen, in the interim, to stop the occupants if they attempted to drive away from the complex.

In establishing Officer Thielen's lawful presence, one gains some insight from "source[s] outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas v. Illinois*, 439 U.S. at 143-44 n.12. There can be no doubt that private property immediately adjacent to a private home is as constitutionally protected as the home itself. However, the common areas of an apartment complex are not similarly protected. *See United States v. Holland*, 755 F.2d 253, 255 (2d Cir.) (both the Supreme Court and Congress have recognized distinction between an apartment as an abode and common areas), *cert. denied*, 471 U.S. 1125 (1985); *United States v. Jackson*, 588 F.2d 1046, 1052 (5th Cir.) ("what is reasonable in one setting may be unreasonable in another"), *cert. denied*, 442 U.S. 941 (1979); *State v. Clarke*, 242 So. 2d 791, 793 (Fla. App. 1971) ("what constitutes an unreasonable invasion varies with the character of the residence").

Like a motel, an apartment complex shares halls, lobbies, sidewalks, and yards, all designated as common areas available equally to residents and guests, without the need for permission by any one individual tenant. As such, the majority of states have agreed that presence on

the common area of an apartment complex does not implicate the Fourth Amendment. *See, e.g., People v. Berutko*, 453 P.2d 721, 725 (Cal. 1969) (common areas of apartment buildings are available to other tenants as well as others having legitimate business on the premises); *People v. Becker*, 533 P.2d 494, 496 (Colo. 1975) (no reasonable expectation of privacy as to items viewed from common area of apartment building); *State v. Brown*, 503 A.2d 566, 570 (Conn. 1986) (tenant has constitutional expectation of privacy only in areas where his use is exclusive); *Brown v. United States*, 627 A.2d 499, 503-04 (D.C. 1993) (no reasonable expectation of privacy in semi-public area of apartment building); *State v. Clarke*, 242 So. 2d at 794 (residents of an apartment "must be held to an expectation that those using the common facilities of the building would come across the window and look inside"); *Espinoza v. State*, 454 S.E.2d 765, 768-69 (Ga. 1995) (multi-unit apartment residents have no reasonable expectation of privacy in readily accessible common area); *State v. Hook*, 587 P.2d 1224, 1227 (Haw. 1978) (investigative entry by officer into common area between buildings not a search); *People v. Smith*, 604 N.E.2d 858, 864 (Ill. 1992) (no expectation of privacy in common areas shared by other tenants, guests, and invitees); *Latham v. Sullivan*, 295 N.W.2d 472, 476 (Iowa App. 1980) (looking into apartment window from outside route used to reach apartment door not a search); *State v. Ragsdale*, 381 So. 2d 492, 497 (La. 1980) (reasonable expectation of privacy only in completely enclosed patio outside apartment unit); *Commonwealth v. Acosta*, 627 N.E.2d 466, 468 (Mass. 1993) (no search where police observe activity from common area of apartment complex); *State v. Crider*, 341 A.2d 1, 4 (Me. 1975)

(entry by police officer in performance of his duties into accessible common hallway of multiple dwelling not a search); *State v. Macke*, 594 S.W.2d 300, 307 (Mo. App. 1980) (observation through open door from common area violated no rights of defendant); *State v. Taylor*, 401 N.E.2d 459, 461-62 (Ohio App. 1978) (no distinction between police officer using common walkway and use by other occupants of apartment complex or their invitees); *State v. Eddy*, 519 A.2d 1137, 1141 (R.I. 1987) (accessible hallway of apartment building is a public place).

The majority of federal circuits are in agreement with this view. *See, e.g., United States v. Cruz Pagan*, 537 F.2d 554, 558 (1st Cir. 1976) (no reasonable expectation of privacy in condominium's underground parking garage, "a well traveled common area of an apartment house or condominium"); *United States v. Fields*, 113 F.3d at 321 (defendants had no legitimate expectation of privacy in common area accessible to other tenants in multi-family apartment building); *United States v. Holland*, 755 F.2d at 255 ("common halls and lobbies of multi-tenant buildings are not within an individual tenant's zone of privacy even though they are guarded by locked doors"); *United States v. Clark*, 67 F.3d 1154, 1162 (5th Cir. 1995) (no reasonable expectation of privacy in apartment walkway); *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991) (tenant has no reasonable expectation of privacy in common areas of apartment building); *United States v. Acevedo*, 627 F.2d 68, 69 n.1 (7th Cir.) ("well-settled that observations from the common areas of multi-unit dwellings ordinarily do not violate a resident's reasonable expectation of privacy"), *cert. denied*, 449 U.S. 1021 (1980); *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977) (no reasonable expectation of privacy in

apartment building's common hallways equally "available for the use of residents and their guests, the landlord and his agents, and others having legitimate reasons to be on the premises").[2]

Under the facts of this case, Officer Thielen was permitted in the course of his law enforcement duties to enter the common area of the apartment complex. When he made his observations of the drug packaging activities within the apartment, he was in a place and at a vantage point he was permitted to be.[3] Because no legitimate

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[2] In some instances, courts have reasoned that a tenant's ability to control access to common areas would dictate a different result. *See, e.g., United States v. Corriger*, 541 F.2d 545, 550 (6th Cir. 1976); *United States v. Booth*, 455 A.2d 1351 (D.C. 1983); *People v. Trull*, 380 N.E.2d 1169 (Ill. 1978); *State v. DiBartolo*, 276 So.2d 291 (La. 1973); *Garrison v. State*, 345 A.2d 86 (Md. 1975); *State v. Harnisch*, 931 P.2d 1359 (Nev. 1997). This notion has no application to the instant case where no claim can be made that the tenants exercised any control over the common area.

[3] Even if one assumes arguendo that Officer Thielen was technically trespassing, the Fourth Amendment does not preclude the intrusion. "The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated." *United States v. Karo*, 468 U.S. at 712-13. *Accord Oliver v. United States*, 466 U.S. 170, 183-84 (1984) (trespass by police officers onto private property, but no Fourth Amendment violation). *See also Florida v. Riley*, 488 U.S. at 459 (Brennan, J., dissenting) ("we have consistently refused to equate police violation of the law with infringement of the Fourth Amendment"); *State v. Hook*, 587 P.2d at 1227 (immaterial whether entry onto common area may have constituted a technical trespass); *United States v.*

(continued...)

privacy interest was offended, Officer Thielen's actions in walking up to a window on the common area of an apartment complex did not call for invocation of any Fourth Amendment sanctions.

C. Officer Thielen's observations into the apartment were neither aided nor enhanced.

Katz clarified that determination of Fourth Amendment issues "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." 389 U.S. at 353. The Fourth Amendment "protects people, not places." *Id.* at 351-53. However, the concept of physical space remains a consideration in determining the applicability of Fourth Amendment analysis. *United States v. Dunn*, 480 U.S. at 300. Private residences, including an apartment, merit special protection.

> [P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. . . . Searches and seizures inside a home without a warrant are

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[3](...continued)

Cruz Pagan, 537 F.2d at 558 (whether or not agents' entry was a trespass not the relevant inquiry); *United States v. Fields*, 113 F.3d at 322 (ultimate focus of Fourth Amendment analysis is not on concept of trespass, but on expectations of privacy); *United States v. McGrane*, 746 F.2d 632, 634-35 (8th Cir. 1984) (agent's status as trespasser of no consequence); *United States v. Nohara*, 3 F.3d 1239, 1242 (9th Cir. 1993) (no expectation of privacy in common areas of building whether or not officer trespasses).

> presumptively unreasonable absent exigent circumstances.

United States v. Karo, 468 U.S. at 714-15 (1984). Nonetheless, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *United States v. Katz*, 389 U.S. at 351.

"As a general proposition, it is fair to say that when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a 'search' within the meaning of the Fourth Amendment." 1 Wayne R. LaFave, *Search and Seizure* § 2.2(a), at 395 (3d ed. 1996). In this case, Officer Thielen did nothing extraordinary in the course of viewing the interior of the apartment. Respondents contend that by closing the window blinds, they exhibited a subjective expectation that the activities conducted in the room would be private. The existence of a noticeable gap in the window blinds allowing for observation negates that expectation.

Residents, invitees, and others use the common area of a multi-unit apartment complex with sufficient regularity that any expectation of privacy from observation through a gap in window blinds is not one that society is prepared to recognize as reasonable.

> "Peering through a window or a crack in a door or a keyhole is not, in the abstract, genteel behavior, but the Fourth Amendment does not protect against all conduct unworthy of a good neighbor. Even surveillance of a house to see who enters and leaves is something less than good manners would permit. But it is the duty of a policeman to investigate, and

> we cannot say that in striking a balance between the rights of the individual and the needs of law enforcement, the Fourth Amendment itself draws the blinds the occupant could have drawn but did not."

People v. Berutko, 453 P.2d at 726 (quoting *State v. Smith*, 181 A.2d 761 (N.J.), *cert. denied*, 374 U.S. 835 (1962)). *See also People v. Becker*, 533 P.2d at 496 (observation from common area in front of apartment through uncurtained part of window adjacent to front door not a search); *State v. Clarke*, 242 So.2d at 794 (no expectation of privacy "with relation to what they did inside the window within easy view of any person on that fire escape"); *People v. Wright*, 242 N.E.2d 180, 184 (Ill. 1968) (looking into dwelling from common area of passageway of apartment complex not a search), *cert. denied*, 395 U.S. 933 (1969); *Latham v. Sullivan*, 295 N.W.2d at 476 (no search to look in apartment window from outside route to front door); *Commonwealth v. Hernley*, 263 A.2d 904, 907 (Pa. Sup. Ct. 1970) (in order to establish expectation of privacy, "it was incumbent on the suspect to preserve his privacy from visual observation .... The law will not shield criminal activity from visual observation when the actor shows such little regard for his privacy."). *Accord United States v. Taylor*, 90 F.3d 903, 908-09 (4th Cir. 1996) (where vertical blinds not fully closed and position of blinds did not preclude view of room from outside, defendants did not exhibit an expectation of privacy); *United States v. Acevedo*, 627 F.2d at 69 n.1 (tear in inside covering of window indicated defendant "no longer had an expectation that those who passed the window refrain from looking in.").

Contrary to the opinion of the Minnesota Supreme Court, the actions of Officer Thielen in this case were far

from extraordinary. A brief look at readily observable activity through the window from the common area of the apartment complex was, for all practical purposes, the same as the police surveillance of a backyard or greenhouse, whether from the ground or air. *See California v. Ciraolo*, 476 U.S. at 215 ("The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye."); *Florida v. Riley*, 488 U.S. at 449-50 (same); *United States v. Dunn*, 480 U.S. at 304 (same with respect to ground surveillance).

This was not a case of "a policeman walking down the street carrying a[n activated] parabolic microphone capable of picking up conversations in nearby homes." *United States v. Karo*, 468 U.S. at 712. It was not "surveillance of private property by using highly sophisticated equipment not generally available to the public, such as satellite technology." *Dow Chemical Co. v. United States*, 476 U.S. at 238. Nor was it the government surreptitiously using an electronic device to obtain information "that it could not have obtained by observation from outside the curtilage of the house." *United States v. Karo*, 468 U.S. at 715. It did not include utilization of even the most common enhancement devices, such as searchlights, binoculars, or telescopes.

It was, in fact, observation from a common area using nothing more than the naked eye. That Officer Thielen turned his body or cocked his head to see has no constitutional significance. Whether an officer constitutionally intrudes on an individual's privacy interest cannot reasonably be held to depend upon the chance factor of the location of the uncovered portion of the window.

In sum, Officer Thielen was able to see into the apartment from a public vantage point. Therefore, Respondents had no reasonable expectation of privacy in their drug packaging activities. Under the correct constitutional analysis, Officer Thielen's actions did not constitute a search warranting Fourth Amendment sanctions.

CONCLUSION

For the reasons stated, the judgment of the Minnesota Supreme Court should be reversed.

Respectfully submitted,

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